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Public Prosecutor v Wan Mohd Rahim bin Wan Mohd Zin

B HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NO 41–139 OF 2006
NALLINI PATHMANATHAN JC
18 APRIL 2007

C *Criminal Law — Penal Code (Malaysia) — s 379A — Theft of motor vehicle — Possession — Presumption of possession — Whether appellant had shown respondent was in possession of the motorcycle dishonestly — Whether the recovery of stolen property was 'soon after' theft — Penal Code s 379A*

D *Evidence — Presumptions — of fact — Possession of stolen property — Criteria to be met before considering whether to apply presumption — Consequences of applying the presumption — Evidence Act, 1950 s 114(a)*

E The respondent was arrested for riding the stolen motorcycle which bore false number plates with a different registration number, belonging to Mohd Noor bin Long. However, the pillion rider managed to run away after the police had taken his national identity card for verification. The respondent was accordingly charged with theft under s 379A of the Penal Code or alternatively, for receiving stolen property under s 411 of the Penal Code. The learned Magistrate however, acquitted the
F respondent without calling for his defence on the ground that a prima facie case had not been made out by the appellant. There was no proof that the respondent had dishonestly stolen the motorcycle or had taken the motorcycle with the intention of causing loss to the owner or making unlawful gain for himself. Further, the learned magistrate declined to utilise the presumption under s 114(a) Evidence Act 1950 (EA) in view of the lapse of a period of seventeen days between the theft of the
G motorcycle and the day when the accused was seen riding the motorcycle. She also applied s 114(g) EA by stating that the appellant had failed to secure the attendance of a crucial witness, the pillion rider, resulting in a gap in the prosecution's case. Against the decision, the appellant appeal to this court. It was contended that the learned magistrate had failed to address her mind to relevant considerations in
H deciding whether or not to apply s 114(a) EA, thereby occasioning an error of law and that s 114(g) EA was erroneously applied.

Held, allowing appeallant's appeal:

I (1) The possession of the motorcycle was with the respondent at the material time. He was riding the motorcycle. He had the physical capacity to stop or ride away or drive the vehicle where and how he pleased. It cannot be said that he was merely physically present or in physical proximity to the vehicle. He had sole control, custody and dominion of the motorcycle. He had intelligent and

conscious possession of the motorcycle. While it is true that there was a pillion rider, it cannot be said that the pillion rider had possession of the motorcycle, as it was the respondent who was riding it (see para 14).

(2) There are no inflexible rules about the minimum or maximum lengths of time which should lapse in order that the presumption may or ought not to be drawn. Each case must depend on its own facts. Given that a motorcycle is a bulky piece of machinery that is not as easily disposed of as, say, a piece of jewellery of a common description, the time lapse of 17 days, or a little more than two weeks, is not so long as to preclude the application of the presumption in this case (see para 18).

(3) The application of s 114(a) EA does not have the effect of imputing guilt on the part of the respondent to the charge of theft at this stage. That must be a question to be determined on the totality of the evidence after the respondent chooses to account or otherwise for his possession (see para 21).

[Bahasa Malaysia summary

Responden telah ditahan kerana menunggang motosikal curi yang memakai nombor pendaftaran palsu dan dengan pendaftaran berlainan kepunyaan Mohd Noor bin Long. Pembonceng motosikal berjaya melarikan diri setelah pihak polis mengambil daripadanya kad pengenalan bagi tujuan pengesahaan. Responden telah di dakwa mencuri di bawah s 379A Kanun Keseksaan atau secara alternatif, memperolehi harta curi di bawah s 411 Kanun yang sama. Magistret telah membebaskan responden tanpa meminta pembelaannya atas alasan pihak perayu telah gagal membuktikan suatu kes prima facie. Tidak terdapat bukti bahawa responden telah mencuri motorsikal atau telah mengambil kenderaan tersebut dengan niat membawa kerugian kepada tuanpunya atau menbawa faedah secara tidak sah kepada dirinya. Seterusnya, magistret telah enggan menggunakan andaian di bawah s 114(a) Akta Keterangaan 1950 (AK) atas alasan keluputan tempoh masa selama tujuhbelas hari telah berlalu di antara tarikh kecurian motorsikal dengan tarikh tertuduh dilihat menunggang motorsikal tersebut. Dia juga telah menggunakan peruntukkan s 114(g) AK dengan menyatakan bahawa perayu telah gagal membawa saksi penting, yakni pembonceng, yang mengakibatkan jurang di dalam kes pihak pendakwa. Perayu telah merayu kepada mahkamah ini terhadap keputusan tersebut. Pihak pendakwa. telah menghujahkan bahawa magistret telah gagal memberi penumpuan kepada fakta relevan di dalam memutuskan samada memakai atau sebaliknya s 114(a) Akta Keterangaan 1950, mengakibatkan kesilapan undang-undang and seterusnya telah berlaku kesilapan di dalam pemakaian s 114(g) Akta yang sama

Diputuskan, membenarkan rayuan perayu:

(1) Pada masa tersebut motorsikal tersebut didapati dalam milikan responden. Motorsikal tersebut ditunggangnya. Dia mempunyai keupayaan fizikal sama ada berhenti atau menunggang dari kawasan tersebut atau membawa kenderaan itu ke mana-mana dan sebagaimana yang disukainya. Ia tidak boleh dikatakan bahawa dia hanya wujud secara fizikal atau berdekatan kenderaan tersebut secara fizikal. Dia mempunyai pengawalan, jagaan dan penguasaan

mutlak ke atas kenderaan tersebut. Dia memiliki pengetahuan and kewarasan terhadap pemilikan motorsikal tersebut. Walaupun pada hakikatnya adalah benar bahawa terdapat seorang pembonceng, ia tidak dapat dikatakan bahawa pembonceng tersebut adalah pemilik motorsikal tersebut kerana responden yang menunggangnya (lihat perenggan 14).

(2) Tidak terdapat kaedah yang tidak boleh diubah berkaitan had masa luput minima atau maksima bagi menentukan sama ada andaian boleh dibuat atau tidak. Setiap kes bergantung kepada fakta tersendiri. Memandangkan motorsikal merupakan mesin yang agak besar, yang sukar untuk dilupuskan seperti barang kemas biasa, keluputan masa 17 hari atau sedikit lebih dari dua minggu, adalah tidak begitu lama untuk tidak mengunapakai aplikasi anggapan di dalam kes ini (lihat perenggan 18).

(3) Aplikasi s 114(a) AK tidak ada kesan mengaitkan kesalahan ke atas respondent di atas pendakwaan mencuri setakat ini. Itu merupakan suatu persoalaan untuk di putuskan berdasarkan keseluruhan keterangan selepas responden memilih untuk mengaku pemilikannya atau sebaliknya (lihat perenggan 21).]

Notes

For a case on presumption of fact, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2072.

For cases on Penal Code (Malaysia) genarally, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1181–1910.

Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1 (refd)
Berry v British Transport Commission [1961] 3 WLR 450 (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137 (refd)
Mah Kok Cheong v R [1953] MLJ 46 (refd)
Metroplex Development Sdn Bhd v Mohd Matana bin Makadass [1955] 2 MLJ 276 (refd)
PP v Hong Ah Huat [1971] 1 MLJ 52 (refd)
PP v Looi Kow Chai [2003] 2 MLJ 65 (refd)
R v Schama [1914] 84 LIKB 396; 11 CR APP R 45 (refd)

Legislation referred to

Evidence Act 1950 ss 114(a), (g)
Penal Code ss 411, 379A

Tuan Azar Irwan (AG's Chambers) for the appellant.
Arriff Azami Hussein (Azizzul Adzly & Ariff) for the respondent.

Nallini Pathmanathan JC:

INTRODUCTION

[1] This is an appeal by the appellant against the decision of the learned magistrate of Shah Alam, Selangor made on 27 September 2006, acquitting the respondent (the accused in the court below) without his defence being called in respect of:

(a) A charge of theft of a motorcycle under s 379A of the Penal Code; and

(b) An alternative charge of receiving stolen goods under s 411 of the Penal Code. A

[2] The petition of appeal however made reference solely to the decision of the magistrate acquitting the accused under s 379A. The respondent submitted that the appeal should be restricted to this charge and the appellant acquiesced to this. Accordingly the appeal was restricted to the charge under s 379A of the Penal Code. B Several grounds of appeal are set out in the petition of appeal, but during the course of hearing, appellant's counsel confined himself to only two grounds ie, whether, on the given facts, the learned magistrate had erred:

(i) in failing to apply s 114(a) of the Evidence Act 1950 ('s 114 EA'); and

(ii) in applying s 114(g) of the Evidence Act 1950 ('s 114(g) EA') in arriving at her decision. C

THE FACTS OF THE CASE

[3] On the 30 December 2004 one Mohd Noor bin Long, the registered owner of D a motorcycle, bearing registration number BFK 5152, reported the loss of his vehicle. He had parked it outside an apartment block in section 27, Shah Alam and when he returned 25 minutes later, the motorcycle had disappeared. Seventeen days later, on 16 January 2005 at about 8pm, three police officers who were making a routine evening inspection in Serdang, noticed two men on a motorcycle acting in E 'a suspicious manner'. They stopped the vehicle for an inspection and asked the two men for identification. The men produced their national identity cards. At this point, one of the men, the pillion rider, ran away. The police officers gave chase, but lost him. They did, however, have his national identity card. The respondent, who was riding the motorcycle was co-operative. The officers found on further investigation that the motorcycle, which now bore false number plates with a different registration F number, belonged to Mohd Noor bin Long. The respondent was then arrested and charged with theft under s 379A of the Penal Code or alternatively, for receiving stolen property under s 411.

[4] At the trial of this matter, the appellant called four witnesses, namely the owner G of the motorcycle, two of the three police officers who had come upon the accused riding the stolen motorcycle, and the investigating officer.

LEARNED MAGISTRATE'S GROUNDS OF JUDGMENT

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[5] On these facts, the learned magistrate acquitted the respondent without calling for defence, holding that there was no proof that the respondent had dishonestly stolen the subject motorcycle, or that the respondent had taken the motorcycle with the intention of causing loss to the owner or making unlawful gain for himself. She decided not to utilise the presumption under s 114(a) of the EA in view of the I lapse of a period of seventeen days between the theft of the motorcycle and the day when the accused was seen riding the motorcycle. The learned magistrate also applied s 114(g) of the EA, stating that the appellant had failed to secure the attendance of

a crucial witness, the pillion rider, resulting in a gap in the prosecution's case. She concluded that a prima facie case had not been made out by the appellant.

SUBMISSIONS ON APPEAL

[6] The appellant submitted in summary, that:

(1) The learned magistrate had failed to address her mind to relevant considerations in deciding whether or not to apply s 114(a) of the EA, thereby occasioning an error of law;

(2) Defence should have been called in this case; and that

(3) s 114(g) of the EA was erroneously applied.

[7] In response, the respondent urged the court, in its appellate capacity and in accordance with well-established principles, to be slow to interfere with the decision of the learned magistrate not to apply s 114(a) of the EA and to invoke s 114(g) of the EA, particularly where such decision was based on findings of fact. Learned counsel went on to submit that there was no direct evidence of theft and that s 114(a) of the EA should not be applied because of the lengthy lapse of time between the theft and the recovery of the motorcycle.

THE LAW

Exercise of appellate jurisdiction

[8] I have kept at the forefront of my mind, the well established and documented principle that an appellate court is not to interfere lightly with the findings or decision of the learned magistrate, who has had the advantage of seeing and hearing the witnesses. Any such interference should therefore be cautiously executed and would only be justified where, for example, there has been a misdirection of law (see *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137) Bearing these principles in mind, I have proceeded to consider the two issues raised by the appellant in this appeal.

Issue 1: Was there a failure to apply s 114(a) of the EA?

Presumption of Fact

[9] Section 114(a) of the EA is a one of a series of presumptions of fact, which as stated in *Sarkar on Evidence*, Vol 2 (14th Ed) at p 1505:*... are nothing more than logical inference of the existence of one fact drawn from other proved or known facts without the help of any artificial rules of law and they are always rebuttable.* It means that as the consequence of the proof of an initial series of facts by one party, the court may presume the existence or happening of a separate act or event, unless there is an explanation or evidence to the contrary. The fact that the words used are 'may presume' clearly indicate that it is left to the discretion of the court to decide whether on any particular set of facts, the presumption should be invoked. The discretion is exercised having regard to the 'common course of natural events, human conduct in their relation to the facts of the particular case'. The presumption is an evidentiary

presumption rather than a presumption allocating the burden of proof. Its effect is to cast on the opponent party the duty of producing evidence to the contrary. A

[10] In *Mah Kok Cheong v R* [1953] MLJ 46, Spenser Wilkinson J had occasion to consider the classes of criminal cases where the law imposed different evidentiary burdens. He said with regard to the category relating to theft and receiving stolen property (at p 47): B

> ... Cases of theft or receiving where the only evidence against the accused is the possession of property recently stolen. These cases are really in a class by themselves — they may be looked upon not so much as cases where the law has cast a burden of proof upon the accused, but rather as cases where the law has given special significance to a certain class of circumstantial evidence, namely, the possession of stolen goods. The law is that such possession is in itself evidence of the theft or receiving unless explained C

This sums up the applicability and effect of s 114(a).

What are the criteria to be met before considering whether to apply s 114(a) of the EA? D

[11] What then are the facts that should be proven, or the criteria to be met, to warrant the possible application of s 114(a) of the EA? In *Public Prosecutor v Hong Ah Huat* [1971] 1 MLJ 52, Sharma J, set out the facts which have to be proved directly before the court can even consider invoking s 114(a) of the EA (at p 53): E

> ... In every case under s 411 of the Penal Code two facts, namely (i) that a theft was committed and certain articles were stolen and (ii) that the stolen articles were recovered from the possession of the accused have to be established by direct evidence … If these two facts are established and the recovery from the possession of the accused is recent, it is open to the court to presume under Illustration (a) of s 114 of the Evidence Ordinance that the accused is either the thief or a receiver of stolen goods. This presumption though rebuttable, when explained either by direct evidence or by the character and habits of the possessor otherwise, is usually regarded by the jury as conclusive. The question as to what amounts to recent possession varies according to whether the stolen article is or is not calculated to pass readily from hand to hand. It depends upon the nature of the article itself. Wigmore in his work on *Evidence* says: F G
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> > On a charge of taking goods, the fact that A was found, subsequently to the taking, in possession of the goods taken is relevant to show that he was the taker. It is true that several other hypotheses are conceivable as explaining the fact of his possession; nevertheless the hypothesis that he was the taker is a sufficiently natural one to allow the fact of his possession to be considered as evidentiary. There has never been any question of this. H
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> Dealing with the matter Taylor in his book on *The Law of Evidence* says:
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> > This presumption is in all cases of fact rather than of law. It is occasionally so strong as to render unnecessary any direct proof of what is called the corpus delicti. I
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> Before s 114 can be applied it must be proved
>
> (i) that the property is stolen;

(ii) that a person is in possession of the property; and

(iii) that this was soon after the theft...

The word 'possession' implies a physical capacity to deal with a thing as we like to the exclusion of everyone and a determination to exercise that physical power on one's own behalf. It implies dominion and consciousness in the mind of the person having dominion over the object. Possession must be conscious and intelligent possession and not merely the physical presence of the accused in proximity or even in close proximity to the object.

[12] In that case, the charge against the respondent was of dishonest receipt of stolen goods under s 411 rather than s 379A. Notwithstanding this, the test remains the same as s 114(a) clearly contemplates the possible use of this presumption either in the case of theft or the receipt of stolen property.

ANALYSIS

(i) Was the property in question 'stolen property'?

[13] With respect to the first fact that has to be proved, namely that the properly is stolen, the record shows that the owner of the motorcycle gave evidence of the loss of his vehicle, as described above. This is not in dispute.

(ii) Did the respondent have 'possession' of the motorcycle?

[14] With respect to the second ingredient, possession, the evidence shows that when stopped by the police seventeen days after the theft, the respondent was riding the motorcycle. He had the physical capacity to stop or ride away or drive the vehicle where and how he pleased. It cannot be said that he was merely physically present or in physical proximity to the vehicle. To my mind the respondent had sole control, custody and dominion of the motorcycle. He had intelligent and conscious possession of the motorcycle. While it is true that there was a pillion rider, it cannot be said that the pillion rider had possession of the motorcycle as it was the respondent who was riding it. Counsel for the respondent advocated the point that there was no 'possession' by the respondent because:

(a) There was no 'dishonest' possession of the motorcycle and mere physical possession was in itself insufficient to warrant the application of the presumption so as to result in a finding of theft;

(b) In cross-examination the appellant's witnesses had conceded, when it was put to them, that it was possible that it was the pillion rider who had real possession, but had merely asked the accused to drive the vehicle; and

(c) The fact that the pillion rider had 'run away' pointed to the fact that he was the one who had stolen the motorcycle.

[15] With respect, the issue of 'dishonest' possession does not arise at this stage. Once possession is proved (and it has been shown that the property is stolen), then the respondent has to account for it in order to escape from the presumption under

Illustration (a) to s 114. The presumption only has the effect of determining an evidentiary point, namely whether the respondent is to be called upon to account for his possession of the stolen property. It does not, at this stage, determine the final guilt or otherwise of the respondent in respect of the theft of the motorcycle. His explanation might well show that such possession as he had was in fact innocent. The full impact of s 114(a) of the EA imputing dishonest possession can only arise if the accused does not or cannot account for his possession of the motorcycle.

[16] As for the evidence adduced during cross-examination from the appellant's witnesses, who had accepted the possibility that it could have been the pillion rider who was guilty of the offence of theft or receiving stolen goods in view of his conduct in running away, I am unable to accept that these answers from the police officers in any way prove that the pillion rider was in fact the de facto person in possession of the vehicle. This is because these witnesses do not and could not have had any first hand knowledge of the reason why the pillion rider ran away. Such knowledge would be within the purview of the pillion rider and possibly the accused. The answers of the police officers in cross-examination on this point are therefore not relevant.

[17] Finally with regard to the pillion rider's conduct in 'running away', it cannot automatically be inferred from his behaviour that he was in fact the person who had stolen the bike and asked the respondent to ride it. It is equally possible that he fled the scene panicking, on realizing that he and the accused had been stopped by police officers; or that he was guilty of some other offence bearing no relation whatsoever to the theft of the subject vehicle (see *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1). On the given facts, possession of the motorcycle was with the respondent at the material time.

(iii) Was the recovery of the motorcycle 'soon after' the theft?

[18] This pre-requisite for the application of s 114(a) of the EA requires that the possession of the stolen property must be fairly recent. In this case the time lapse is seventeen days. The term 'soon after' or 'fairly recent' varies according to the nature of the article and how quickly it can pass from hand to hand. There are no inflexible rules about the minimum or maximum lengths of time which should lapse in order that the presumption may or ought not be drawn. Each case must depend on its own facts. Given that a motorcycle is a bulky piece of machinery that is not as easily disposed of as, say, a piece of jewellery of a common description, the time lapse of 17 days, or a little more than two weeks, is not so long as to preclude the application of the presumption in this case. A time frame of months might well, on these facts, have been too long a time lapse to fall within the definition of 'soon after'.

(iv) Should the presumption under s 114(a) be applied?

[19] In deciding whether or not to apply s 114(a) of the EA I have kept in mind the caution sounded by Devlin LJ in *Berry v British Transport Commission* [1961] 3 WLR 450 and echoed by James Foong J (as His Lordship then was) in *Metroplex Development Sdn Bhd v Mohd Matana bin Makadass* [1955] 2 MLJ 276 at p 282:

> … Presumptions of law ought to be used only where their use is strictly necessary for the ends of justice. They are inherently undesirable in the sense that 'estoppels are odious' and the 'doctrine should never be applied without a necessity for it'; per Bramwell LJ in *Baxendale v Bennet* [1878] QBD 525, p 529 (CA) — because they prevent the court from ascertaining the truth, which should be prime object of a judicial investigation, and because if they are allowed to multiply to excess, the law will become divorced from reality and will live among fantasies of its own...

[20] Bearing this in mind, I am of the view that, s 114(a) of the EA is applicable directly on the facts of the instant case. The learned magistrate's decision to the contrary resulting in an acquittal of the respondent was occasioned by her failure to address her mind to the criteria to be met in deciding whether or not to apply s 114(a) of the EA. She also decided not to apply s 114(a) of the EA for incorrect reasons, namely that certain ingredients to prove theft were not proven, and that the time lapse of seventeen days was too long. As such, I am of the view that the learned magistrate had misdirected herself when she failed to apply s 114(a) of the EA on the given facts.

The consequences of applying s 114(a) EA

[21] If indeed the presumption had been applied, then the evidentiary burden would have shifted to the respondent merely to account for his possession of the vehicle, resulting in defence being called. This shifting of the evidentiary burden in no way alters the burden of proof which always lies with the appellant. If an explanation is given which may be true or which the court thinks may reasonably be true, the respondent would still be acquitted because the appellant would not then have discharged the onus of proof imposed upon it of satisfying the court beyond reasonable doubt of the respondent's guilt, (see *R v Schama* [1914] 84 LIKB 396; HCr App R 45). The onus will always lie on the Appellant to show that the respondent was in possession of the motorcycle dishonestly, and not on the respondent to show that he was in possession of the motorcycle honestly. In other words the application of s 114(a) of the EA does not have the effect of imputing guilt on the part of the respondent to the charge of theft at this stage. That must be a question to be determined on the totality of the evidence after the respondent chooses to account or otherwise for his possession.

Issue 2: Is s 114(g) of the EA applicable?

[22] The second issue that was raised in this appeal was the application of s 114(g) of the EA by the magistrate on the grounds that the appellant failed to call an important witness to the proceedings, namely the pillion rider whose evidence was significant to the case. The appellant contends that the learned magistrate did not consider that it made several attempts to procure this witness's presence by trying to trace him at two different addresses pointed out by the respondent. The appellant did however, have in its possession, the national identity card of the pillion rider, but took no steps to independently procure his presence by conducting searches at the relevant registries. This failure on the part of the appellant is clear.

[23] As s 114(a) of the EA ought to have been applied in the first instance in relation to the charge of theft, even if s 114 (g) of the EA is applied at this stage, the respondent would still have to provide an account of how he came to be in possession of the motorcycle. The inference that the pillion rider's presence would be adverse to the appellant's case does not, (in the absence of an account from the respondent) detract from the fact that the respondent was at the material time in possession of the stolen motorcycle soon after the theft. This would not therefore affect the issue of whether a prima facie case had been made out in accordance with the test in *Public Prosecutor v Looi Kow Chai* [2003] 2 MLJ 65.

CONCLUSION

[24] As a consequence of this failure to apply s 114(a) of the EA on the given facts, the learned magistrate wrongly concluded that a prima facie case had not been made out thereby occasioning an error of law. On the given facts, I am of the view that the appellant had established a prima facie case in accordance with the test in *Public Prosecutor v Looi Kow Chai* [2003] 2 MLJ 65. For the reasons above, the appeal is allowed, the order of the magistrate is set aside and defence is called.

Appeal allowed.

Reported by Ashgar Ali Ali Mohamed